LIBRARY
SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
AUG 7 1969
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

October Term, 1969

No. 120

FRANK R. FRANKO,

Petitioner,

v.

MAHONING COUNTY BAR ASSOCIATION

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITIONER'S REPLY BRIEF

Eugene Gressman
1730 K Street, N.W.
Washington, D.C. 20006

Counsel for Petitioner

July, 1969

In the

Supreme Court of the United States

October Term, 1969

No. 120

FRANK R. FRANKO,

Petitioner,

v.

MAHONING COUNTY BAR ASSOCIATION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITIONER'S REPLY BRIEF

With respect to the five numbered arguments presented by the respondent's brief in opposition, the petitioner states as follows:

I

Respondent's assertion (Opp. Br., p. 4) that the *Ruffalo* doctrine is here inapplicable since the Chappel amendment to the charges against the petitioner was made prior to petitioner's testimony ignores the critical impact of the *Ruffalo* decision. The amendment in *Ruffalo* was indeed made subsequent to Ruffalo's testimony and was premised on that testimony, thereby making the proceedings a "trap." 390 U.S. at 551. But the essential holdings of this Court were that any lawyer undergoing disbarment proceedings is entitled to "'fair notice of the charge" (390 U.S. at 550) and that the charge "must be known *before* the proceedings commence" (390 U.S. at 551, emphasis added).

In this case, the amendment adding the new Chappel charge was permitted not *before* the commencement of the proceedings but during the second day of the three-day trial. Tr. 248. Petitioner's counsel immediately objected that petitioner was unprepared to meet this new charge and requested a continuance so that a proper defense might be prepared; both the objection and the request were denied. Tr. 247, 250. The only argument advanced by the respondent in support of such a procedure was that the petitioner was present throughout the proceedings and ought to be aware of all aspects thereof. Tr. 247-248. Such an argument is akin to a claim that a defendant charged with armed robbery is not prejudiced if, in the defendant's presence during the trial on that charge, the indictment is amended to add a new charge that on a different date the defendant committed arson.

The answer, as this Court held in *In re Gault*, 387 U.S. 1, 33, is that "Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.' "

It is no answer to that elemental proposition, of course, that application of due process procedures would have led to the same result. *Coe v. Armour Fertilizer Works,* 237 U.S. 413, 424.

And so here, as in *Ruffalo* (390 U.S. at 551), "How the [new] charge would have been met had it been originally included in those leveled against petitioner by the Ohio Board of Commissioners on Grievances and Discipline no one knows." One cannot know, for example, what testimony or evidence petitioner might have brought to bear on the new charge had he been given adequate notice and an opportunity to prepare a defense prior to the commencement of the hearing.

Thus the fact that the amendment was here made prior to petitioner's testimony but after the commencement of the proceedings only goes to the degree of prejudice that petitioner presumably suffered. In the constitutional sense, however, petitioner was as effectively denied procedural due process as was Ruffalo, a denial stemming from the conceded "absence of fair notice [prior to the hearing] as to the reach of the grievance procedure and the precise nature of the charges" (390 U.S. at 552). Therein lies the unwarranted failure of the Ohio Supreme Court to respect the teachings of the *Ruffalo* decision in the proceedings below.

II

Respondent has asserted (Opp. Br., p. 4) that the Ohio Supreme Court would have disbarred petitioner even without consideration of the Chappel incident. The implication is that the denial of procedural due process implicit in the addition of the Chappel charge after the commencement of the proceedings may safely be ignored. But since the disbarment determination was concededly based substantially though not exclusively upon the Chappel incident, the respondent's assertion is impermissible.

The Court has consistently made plain that adequate and timely

notice is the fulcrum of due process. And no decision has ever intimated or held that, where a determination rests in whole or in part upon evidence obtained in violation of a basic due process concept, the violation may be excused by reference to other evidence secured in compliance with due process. On the contrary, the Court has held time and again that where a conviction rests in part upon so fundamental a denial of due process as the use of an involuntary confession the conviction is invalid even though there may be ample other evidence to support the conviction. *Jackson v. Denno,* 378 U.S. 368, 376; *Payne v. Arkansas,* 356 U. S. 560, 568; *Malinski v. New York,* 324 U.S. 401, 404. The same result must follow where the due process defect involves the absence of an adequate and timely notice.

III

Respondent further assents (Opp. Br., p. 6) that petitioner had no constitutional right to be tried under procedural remedies in existence at the time of the alleged misconduct. But petitioner makes no such claim. What he does maintain is that the Fourteenth Amendment prohibits a retroactive application of new procedural rules to place him in double jeopardy.

The significance of petitioner's contention has been augmented by this Court's ruling on June 23, 1969, in *Benton v. Maryland,* No. 201, Oct. Term 1968. It was there held that the double jeopardy prohibition of the Fifth Amendment, representing a fundamental ideal in our constitutional heritage, should apply to the States through the Fourteenth Amendment. What remains to be decided, through the vehicle of the instant case, is whether that double jeopardy prohibition should also apply to state quasi-criminal matters such as disbarment proceedings. That is the important issue that now deserves exploration and resolution by this Court.

IV

The respondent flatly states (Opp. Br., p. 6) that the disbarment charges had not been submitted to or considered by any court in Ohio prior to their consideration by the Board of Commissioners and the Ohio Supreme Court.

The record shows, however (Addenda to Petition to Vacate Order of Disbarment, pp. 32-33), that on November 23, 1956, the Trustees of the Mahoning County Bar Association requested that the judges of the Court of Common Pleas of Mahoning County institute disbarment proceedings, pursuant to Section 4705.02 of the Ohio Code, against the petitioner with respect to the following specifications:

1. Petitioner's failure to enter upon drivers' licenses the fact of conviction or plea of guilty of traffic offenses - - the identical specification subsequently made in 1957 before the Board of Commissioners.

2. Petitioner failed to make such entries in order to curry favor with and obtain the votes of the persons who received the benefit of such practices - - a charge clearly encompassed within the subsequent 1957 charges.

3. Petitioner failed to resign as judge while running for a non-judicial office - - a specification identical to one later made in 1957.

4. In running for non-judicial office, petitioner used his influence as a judge to further his candidacy - - a charge that was a focal point of the 1957 specifications and ultimate disbarment order.

The record further shows (Addenda to Petition to Vacate Order of Disbarment, p. 37) that the Common Pleas Judges "referred to the Board of Trustees the complaints which had been

filed with the Court" and "found that these matters were practical for handling under the new rule of discipline which goes into effect January 1, 1957, as promulgated by the Supreme Court of Ohio." Such proceedings were subsequently instituted under the new rule, resulting in the disbarment order by the Ohio Supreme Court.

The record, consisting in this respect of the minutes of the meetings of the Trustees of the Bar Association, thus demonstrates that identical charges were brought against petitioner in 1956 and that the Common Pleas Court declined to litigate those charges because of the prospective availability of a new disbarment procedure. But as this Court held in *Angel v. Bullington*, 330 U.S. 183, 190, "it is a misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation. An adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another court of the State."

A substantial question is thus presented whether the "adjudication" of the Common Pleas Court, refusing to process the earlier disbarment charges, constitutes *res judicata* within the scope of *Angel v. Bullington*, thereby bringing into operation the double jeopardy prohibition of the Fourteenth Amendment when identical charges were brought in 1957.

V

Respondent's final argument (Opp. Br., p. 7) that petitioner had no constitutional right to continue to hold his judicial office until the end of his elected term misconceives petitioner's position. Petitioner claims no such right. The question that he does present is whether the Due Process and Equal Protection Clauses of the Fourteenth Amendment permit an elected state court judge to be singled out for disbarment proceedings based upon alleged judicial misconduct. Is it not discriminatory and unfair to impose on that

one judge the different and more indelible sanction of disbarment, while all other judges accused of impropriety in judicial office are subjected to removal or impeachment proceedings? To that question, respondent offers no answer.

For these reasons, supplementing those in the petition, certiorari should be granted to review the judgment below.

Respectfully submitted,

Eugene Gressman
1730 K Street, N.W.
Washington, D.C. 20006

Counsel for Petitioner